Nos. 74-1608 and 74-1619

Supreme Court, U. S.
FILED
AUG 15 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

FEDERAL POWER COMMISSION, PETITIONER

v.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

ROBERT H. BORK,
Solicitor General,

J. STANLEY POTTINGER,
Assistant Attorney General,
Department of Justice,
Washington, D.C. 20530.

ABNER W. SIBAL,
General Counsel,
Equal Employment Opportunity Commission,
Washington, D.C. 20506.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1608

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

No. 74-1619

FEDERAL POWER COMMISSION, PETITIONER

v.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

INTEREST OF THE AMICI CURIAE

The United States and the Equal Employment Opportunity Commission are responsible for enforcing Title VII

of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e, *et seq.*, which prohibits discriminatory employment practices. The decision in this case, which involves the authority of the Federal Power Commission to proscribe, or to take account of, discriminatory employment practices by persons subject to its regulatory jurisdiction, may affect the *amici's* enforcement responsibilities.[1]

STATEMENT

On June 22, 1972, the National Association for the Advancement of Colored People and a number of other civil rights organizations (cross-petitioners herein) petitioned the Federal Power Commission to issue a rule providing for the comprehensive regulation by the Commission of the equal employment practices of the companies it regulates.[2] The Commission dismissed the petition for lack of jurisdiction, stating that it has no statutory authority to regulate the employment practices of its regulatees (Pet. App. 42a-74a).

On petition for review, the court of appeals vacated the Commission's order and remanded the case for further proceedings (*id.* at 1a-40a). The court held, in an exhaustive opinion, that "the Commission is neither empowered nor required to adopt the rule as proposed" (*id.* at 8a). Congress did not intend "for the Commission to entertain and to adjudicate individual complaints of employment dis-

---

[1]EEOC accordingly filed a brief as *amicus curiae* in the court of appeals in this case.

[2]The rule that was proposed by cross-petitioners is reproduced at Pet. App. 34a-40a. ("Pet. App." refers to the appendix to the Federal Power Commission's petition for a writ of certiorari, No. 74-1619.)

crimination by its regulatees, and to impose sanctions unrelated to the performance of its central regulatory purposes" (*id.* at 24a-25a).

The court also held, however, that the Commission's statutory responsibility to ensure "that no unnecessary or illegitimate costs are passed along to [the] consumer" carries with it the limited authority to take into account, in the discharge of its usual regulatory functions, the "[c]osts incurred by reason of a regulatee's choosing to practice racial discrimination" (*id.* at 25a). The court enumerated the following costs as "indicative of those arguably within the Commission's range of concern" (*ibid.*):

> (1) duplicative labor costs incurred in the form of back pay recoveries by employees who have proven that they were discriminatorily denied employment or advancement, (2) the costs of losing valuable government contracts terminated because of employment discrimination, (3) the costs of legal proceedings in either of these two categories, (4) the costs of strikes, demonstrations, and boycotts aimed against regulatees because of employment discrimination, (5) excessive labor costs incurred because of the elimination from the prospective labor force of those who are discriminated against, and (6) the costs of inefficiency among minority employees demoralized by discriminatory barriers to their fair treatment or promotion. [*Id.* at 25a-26a; footnote omitted.]

The court recognized that some of these possible costs might be "very questionable and virtually unquantifiable" and that "[t]he problem of how to see that they are not borne by the consumer could arise in any number of differ-

ent regulatory contexts" (*id.* at 26a). It accordingly left for the Commission to determine in the first instance the manner in which to approach the problem as part of its normal regulatory functions (*ibid.*). The court reiterated, however, that "[t]he line is always to be drawn between regulation reasonably related to the Commission's central functions," which is permitted, "and regulation of employment discrimination for its own sake," which is prohibited (*id.* at 27a).

Although the court held that the Commission was not empowered to adopt the rule proposed by cross-petitioners, it remanded the case for further proceedings rather than affirming the Commission's dismissal. "Not wishing to be understood either to imply by a reversal that the petitioners' proposed rule could be adopted as is, or to endorse by an affirmance the Commission's broad disavowal of any jurisdiction over racial discrimination by its regulatees, we have concluded that the wisest course is to vacate the Commission's order and remand for further proceedings consistent with this opinion" (*id.* at 33a).

The court stated that some portions of the proposed rule might be within the scope of the Commission's authority to promulgate. "[T]hose sections providing for the annual filing with the Commission of a form [containing employment statistics by race, sex, and national origin] already due the EEOC * * *, and for intervention and receipt of evidence in Commission proceedings * * *, might well be viewed as orderly methods of bringing to the Commission's attention information which could be relevant to its deliberations in the ways described in * * * this opinion" (*id.* at 31a).

The court also made clear, however, that the Commission has "considerable discretion, in common with other agencies, not to promulgate rules even when it has the authority to do so" (*id.* at 33a, n. 53). Thus, "[t]he Commission might well determine that rule making in the area of employment discrimination, though permissible, should be deferred at least temporarily in favor of the information and experience to be gained from case-by-case consideration of such matters as they arise in normal rate making and licensing proceedings" (*ibid.*).

DISCUSSION

In our view, the questions presented by the petition and the conditional cross-petition were decided correctly by the court of appeals, and further review is not warranted.

1. The Commission acknowledges that "[c]osts are * * * in issue in any rate proceeding just as compliance with the laws is a fair consideration in licensing proceedings" (Pet. 6). It states, however, that "it does not follow that the Commission may regulate the activities which generate those costs or to require affirmative actions before the Commission to comply with laws it is not mandated by Congress to enforce" (*ibid.*).

That statement, in our view, is a paraphrase of, rather than an attack upon, the holding of the court of appeals. It is the Commission's petition, not the court's decision, that "has confused the consideration of whether to allow certain costs in ratemaking, however incurred, with the consideration and regulation of employment discrimination affecting costs" (Pet. 7). The court did not say that the Commission may or must regulate its regulatees' employment practices whenever those practices

are reflected in higher costs. It said only that the Commission may consider the reasonableness of such costs in a rate proceeding and may consider in the context of a certificate or license renewal proceeding the effect that such costs may have on a company's stability and soundness. That is not regulating employment practices. It is simply taking employment discrimination into account when it has an effect on those things that the Commission does regulate.

The Commission's fear that the court's ruling "would impose an impractical burden on the Commission and would severely impair the ability of the Commission to discharge its statutory responsibilities" (Pet. 8-9) is unfounded. It may be true, as the Commission states, that "[t]he decision would encourage parties in litigation at the Commission to seek the introduction of a large mass of material and issues unrelated to the Commission's area of expertise and * * * not directly related to utility costs or ability to provide service, but concerned with their compliance with the equal opportunity employment requirements of other laws and other agencies" (Pet. 9). It is equally true, however, that under the court of appeals' decision, properly understood, those issues would be irrelevant and the evidence relating to them could properly be excluded.

The Commission understandably is concerned that it "lacks both the staff and the technical expertise to investigate and quantify the hypothetical costs of employment discrimination" alluded to in the court's opinion (Pet. 12). But the court was sensitive to that concern; it recognized that some of the costs it mentioned might prove to be "very questionable and virtually unquanti-

fiable" (Pet. App. 26a). It was for this reason that the court left it to the Commission's broad administrative discretion to consider how best to approach the problem, either by rulemaking or in case-by-case adjudication.

If, as the Commission says (Pet. 12-13), it is not equipped to consider in any meaningful way some of the costs identified by the court of appeals, then it need not do so. The costs enumerated in the court's opinion were characterized only "as indicative of those *arguably* within the Commission's range of concern" (Pet. App. 25a; emphasis added). There is no reason to anticipate at this stage that a reasoned explanation by the Commission of its inability meaningfully to consider a particular cost element in a particular regulatory context will be rejected as inadequate by the court.[3]

2. Cross-petitioners contend (Cross-Pet. 9-14) that "the statutory charge of the FPC to regulate in the public interest is a broad authorization that includes a duty to proscribe discriminatory employment practices through the exercise of its rule-making capacity" (Cross-Pet. 13). As the court of appeals correctly concluded, however, "Congress has not charged the Commission with advancing *all* public interests, but only the public's interest in having the particular mandates of the Com-

---

[3]For example, where, as in natural gas producer rate regulation, the Commission does not ordinarily consider costs on a company-by-company basis (see Pet. 11), it may be impractical to take meaningful account of an individual firm's employment discrimination costs. We do not read the court's opinion as requiring the Commission to alter its usual regulatory methods in such a situation.

mission carried out, its interest, in other words, in the conservation of natural resources and the enjoyment of cheap and plentiful electricity and natural gas" (Pet. App. 19a; emphasis in original).

Cross-petitioners also argue (Cross-Pet. 16-20) that, apart from the Commission's statutory obligations, it has a duty under the Fifth Amendment to prevent employment discrimination by its regulatees. The difficulties with cross-petitioners' analysis are explored in the court's opinion (Pet. App. 27a-30a). Even if the existence of a "'state-action' relationship" (*id.* at 30a) between the Commission and its regulatees is assumed, the Constitution does not require the Commission to regulate in a manner that exceeds its statutory authority and administrative expertise.

Cross-petitioners argue (Cross-Pet. 14-16) that the court of appeals erred in declining to require the Commission to promulgate rules to effectuate its limited jurisdiction over discrimination-related costs. The contention is answered by this Court's decisions in *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202-203, and *National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267, 290-295. As those decisions make clear, "the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion" (*id.* at 294).

This is not a situation in which the Commission's "reliance on adjudication would amount to an abuse of discretion or a violation of the Act" (*ibid.*). As the court of appeals stated, the Commission might well reasonably prefer to proceed cautiously on the basis of "information and experience to be gained from case-by-case consideration of such matters as they arise in normal rate making and licensing proceedings" (Pet. App. 33a, n. 53).

CONCLUSION

The petition and conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

J. STANLEY POTTINGER,
Assistant Attorney General.

ABNER W. SIBAL,
General Counsel,
Equal Employment Opportunity Commission.

AUGUST 1975.

DOJ-1975-08